No. 22,302

IN THE

United States Court of Appeals

For the Ninth Circuit

LOIS COCHRAN,
Appellant,

vs.

MARIO DELIZIO,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S OPENING BRIEF

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This is an action which originated in the Nevada State courts by the filing of the Complaint (Tr. of Rec. 187-189) in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe and transferred by Petition for Removal (Tr. of Rec. 184-186) to the United States District Court for the District of Nevada, in Reno, Nevada, pursuant to 28 U.S.C., Sec. 1332, and 28 U.S.C., Sec. 1441, on behalf of Defendant Mario Delizio, on the basis of diversity of citizenship, and that the matter in controversy exceeded the sum of $10,000.00. The U. S. District Court had jurisdiction by reason of Plaintiff's residence in the State of Nevada and the resi-

dence of Defendant Mario Delizio in the State of California. A jury was demanded by Defendant.

The appeal is taken as a matter of right under the provisions of 28 U.S.C., Sec. 1291, being an appeal from a final decision of a Federal District Court.

STATEMENT OF THE CASE

This is an action for personal injuries suffered by Plaintiff Lois Cochran arising from an automobile collision which occurred in the City of Reno, State of Nevada, on September 25, 1965, at the intersection of West Street and West 5th Street. (T 117) Plaintiff, a licensed practical nurse employed at the Washoe Medical Center, was a passenger in the right front seat of a 1964 Plymouth automobile operated by her husband, Francis Cochran. (T 118-119) Plaintiff suffered severe injuries to her back, right hip, shoulder, neck, right arm and right leg. (T 123)

The 1964 Plymouth was traveling in an easterly direction on 5th Street at a speed of 20-25 miles per hour. (T 119-120) 5th Street was a four lane, through street, with two lanes for eastbound traffic and two lanes for westbound traffic, and as the Cochran automobile proceeded east, each of the intersecting streets for a period of four-five blocks were controlled by stop signs for northbound and southbound traffic. There was a stop sign at the intersection of West Street, the street on which Defendant Delizio was traveling, as it intersected with 5th Street. (T 14, 120) Plaintiff Lois Cochran and her husband Francis Cochran were familiar with these intersecting

streets and were aware that northbound and southbound traffic was required to stop at these stop signs intersecting 5th Street. (T 276)

Defendant Mario Delizio was operating a 1953 Ford automobile (T 58), was traveling in a northerly direction on West Street toward 5th Street, and approaching the stop sign directly in front of him. There were four passengers in his car, Mr. and Mrs. Furry, Mr. Furry's sister, Ada Schaefer, and Adolph Duerring. (T 107-109) He was 71 years old, lived in Greenville, California (T 77-78), and was returning to his home. In doing so, he ordinarily traveled on North Virginia Street, which was uncontrolled for northbound traffic, but had gotten onto West Street. He had never taken that route before (T 81-82), and was not familiar with this northbound street, nor with 5th Street as a through, intersecting street. (T 82) The weather was clear, visibility was good and the pavement of both streets was dry (T 79) There were no traffic controls for traffic proceeding east on 5th Street at this intersection. (T 120) The Reno City Ordinances provided for a speed limit of 25 miles per hour on such through and controlled streets. (T 21, 66) Reno City Ordinance Sec. 10-111, given in the Court's Instruction No. 9, required Defendant Delizio to stop at the stop sign and yield the right of way to any vehicle which entered the intersection from another street or which was approaching so closely on that street as to constitute an immediate hazard. (T 434-435)

As the Cochrans' 1964 Plymouth approached the intersection, there were no objects to obstruct Delizio's vision to his left. (T 92) By contrast, there was a setback of approximately 19 feet of the intersecting curbline of 5th

Street, or a "jog" to plaintiff's right at its intersection with West Street. (T 11) Thus, the Delizio automobile, upon proceeding forward into the intersection was not in a position where it could be readily seen by either the operator of the Plymouth automobile, Francis Cochran, or Plaintiff Lois Cochran, as the passenger in the right front seat. The photographs of the 1964 Plymouth automobile, Plaintiff's Exhibits 1 through 7, show that it was struck directly broadside at the right front door where Plaintiff was sitting. The point in the intersection where the Plymouth automobile had traveled was almost three-fourths of the way through the intersection (T 287), while Defendant Delizio's automobile had traveled only 6 feet into the intersection, measured from the curbline immediately to Defendant's right. (T 16) Defendant Delizio never saw the Plymouth automobile at any time prior to the collision. (T 91) He did not know which direction he looked first but he could see a good half block down 5th Street to the right and a good half block down 5th Street to the left, and he did not see any traffic at all. (T 85-86, 92) He testified the other vehicle was traveling 60 miles per hour or better (T 90, 113), but he never saw the other vehicle before the collision. (T 91, 112) He saw nothing until they hit. (T 111-112) Plaintiff caught a fleeting glimpse of the 1953 Ford automobile, just before the collision, and it did not appear to her that the Delizio automobile made a stop at the stop sign, although she could not state positively that he did not. (T 150-151) Defendant testified that he stopped at the stop sign (T 83), as did his neighbors and passengers, Mr. and Mrs. Furry (T 197, 210) neither of whom ever drove a car in their life. (T 206, 219)

After the accident, Defendant Delizio got out of the automobile and Francis Cochran stated to him, "You did not stop" (at the stop sign) to which he responded "There is nothing I can do about it." (T 115-116)

A diagram of the scene of the accident was prepared by Reno Police Officer Robert Penegor (T 8), Plaintiff's first witness, and introduced in evidence as Plaintiff's Exhibit 16. (T 37) Appellant respectfully refers the Court to said Exhibit 16 in Folder One of the record on appeal.

Also in Folder One is a portion of the Reno City Police Report, Plaintiff's Exhibit 17, showing, among other things, that the Cochrans' Plymouth automobile traveled in an arc a distance of only 46 feet from the point of impact, clearly negativing the existence of any speed in excess of their testimony that it was 20-25 miles per hour. In a straight line the distance from the point of impact to the point of rest would have been less than 46 feet. (T 32) The admissibility of the reverse side of the Police Accident Report was objected to on behalf of Defendant Delizio because it revealed he had been cited by the investigating officers for failure to yield the right-of-way. Those portions of the report making reference to the citation received by Defendant were deleted by the Court and the remainder was admitted in evidence. (T 61-63)

Plaintiff's Exhibit 3, a photograph, shows the damage to the Cochran automobile from the extreme right front through the right passenger door; the heaviest damage to the 1964 Plymouth automobile was to the center of the right front door by reason of the force generated

from the impact of the Delizio automobile. (T 33-34) The arm rest of the door hit Plaintiff in the right hip area and across her back. (T 121) Defendant's 1953 Ford automobile was a total wreck. (T 94)

The Court permitted the deposition of Ada B. Schaefer, who was sitting in the right front seat of the 1953 Ford operated by Defendant Delizio, to be introduced in evidence and read to the jury, despite numerous objections by Plaintiff. (T 251-268) She did not drive an automobile. (T 308) When she first saw the Cochran Plymouth automobile it was a block away and she claimed it hit the Delizio car. (T 309) She further testified that the Cochran Plymouth automobile was going between 70 and 80 miles per hour (T 309-310), yet she also testified that she had *no idea* how fast the Cochran car was going just before the accident happened. (T 322) Also, over strenuous objection, it was introduced in evidence and read to the jury that she suffered personal injuries and had made a claim against Mr. and Mrs. Cochran which was closed. (T 311) She also testified that Defendant stopped at the stop sign (T 306) and that the Plaintiff's vehicle struck the Defendant's vehicle. (T 308)

During the course of the trial, Defendant's counsel offered evidence that the registered owner of the 1964 Plymouth automobile included the name of Plaintiff Lois Cochran, as well as her husband, Francis Cochran. This was objected to by Plaintiff's counsel upon the grounds that ownership of the automobile was incompetent, irrelevant and immaterial to the issues of the case, and that such alleged ownership could not be used as a basis of imputing any claimed negligence on the part of her hus-

band to Plaintiff. (T 168-169) Detailed objections and authorities were also cited (T 231-244), all of which were rejected by the Court.

The jury retired from the courtroom at 2:20 p.m. and returned to the courtroom at 3:25 p.m. with a verdict for the Defendant and against the Plaintiff. (T 445-446)

The questions involved in this Appeal concern primarily the form and content of numerous instructions to the jury given by the trial court. These questions were raised by the exceptions and objections of counsel to the giving of said instructions. The individual instructions and the objections thereto are set forth in detail in the following section setting forth the Specifications of Errors.

SPECIFICATIONS OF ERRORS

I. The Trial Court Erred in Instructing the Jury That Any Negligence of Plaintiff's Husband as Driver of the Car Was Imputable to Plaintiff.

The Court instructed the jury as follows:

> "If you find there was any negligence on the part of Francis Cochran, the husband and driver of the car, which proximately contributed to the collision, such negligence is deemed to be the negligence of the Plaintiff in this case." (T 422-423)

This instruction was excepted to and objection was made by Plaintiff's counsel at the time the court announced the instruction would be given (T 386) and the Court permitted Plaintiff's counsel to adopt all of the exceptions and objections previously made in support of

Plaintiff's position that the driver's negligence, who was Plaintiff's husband, could not be imputed to the Plaintiff. (T 386)

> We submit, first, under Nevada law it is wholly improper and would be improper for this court to instruct the jury that any negligence of the husband Francis Cochran could be legally imputed to the plaintiff Lois Cochran for the purpose of the case. . . .
>
> Secondly, if the court views the matter as we see it in the alternative, that is, that the question under Nevada law at best would be that if there were under this specific statute, known as the family ownership statute, if this court decided that there could be an imputation of negligence with respect to the operation of the automobile by the husband Francis Cochran as a co-owner then we submit that the testimony under the statute would be one of actual ownership, one of control, with all of the well known requisites of control that ownership implies, and we should like as a factual matter to present evidence that in this case the real owner, the actual owner, was Francis Cochran of this automobile, that he purchased it, that he made the decision with respect to the purchase of the automobile, that he cared for it, that he maintained it, that he saw to it that the automobile be repaired, and for the purposes of imputation of negligence we submit to this court that registration with the Department of Motor Vehicles in the State of Nevada is not a sufficient basis legally or factually for this court to instruct the jury that it might refuse to return a verdict on behalf of plaintiff Lois Cochran by reason of any conduct or negligence of her husband through the pure alternative either/or registration of an automobile with the Department of Motor Vehicles. (T 231-233)

Mr. Richard Wait: We are asking first for the court to consider the Nevada law as distinguished from California law and rule in this case as a matter of law that any conduct or negligence of the husband under Nevada law cannot be imputed to the wife, and alternatively if the court does not so rule that the court rule that the actual ownership, the substantive ownership of the automobile is the issue and is the meaning of the statute in Nevada, which is not the statute in California, if the court please, in that in Nevada we have no statute——

The Court: In other words, counsel, if I understand you, you want to produce evidence that the husband earned the money, that he decided on the make of the car, that he maintained it, that he did this and he did the other thing and that that gives him ownership even though the ownership registration may be in the names of both of them, is that correct?

Mr. Richard Wait: Yes, in the sense that the only person's negligence which can be imputed is the real owner and not someone whose name is on a document. (T 240)

Mr. Richard Wait: Our first point—we haven't fully yet presented it to the court and we should like the court to consider this situation—back in 1940, long before this statute was enacted or before California had its statute, I believe before California had its statute, Nevada had a case and the public policy of this state was decided by Frederickson and Watson Construction Company, which is 60 Nevada 117, which held that a husband's contributory negligence should not be imputed to a wife so as to preclude recovery by the wife from a third person, notwithstanding statutes providing that all property acquired after marriage is community property. (T 241-242)

The final reference to the doctrine of imputation of negligence, an extremely prejudicial one, and the objection thereto, occurred in Vol. 2A of the Transcript, during Defendant's closing argument:

> Now, if Mr. Cochran was careless the court will tell you that his negligence is Mrs. Cochran's negligence, that the law in the State of Nevada requires you to deem the negligence of Mr. Cochran that of Mrs. Cochran, and if the driver of the Cochran car was negligent and his negligence contributed in some degree to this accident, there can be no recovery.
>
> Now, I challenge you to hear this in the instructions. If this is a misstatement of law, of course, the court would stop me and say, "Wait a minute, Mr. Wait, that is not the law, but the law is you cannot give five cents of damages in this case if Mr. Cochran was negligent and his negligence was some part of the cause of the accident."
>
> This is a fiction, of course, but if all of the causes of this accident could be included within the circle I have just drawn, all of the causes, all of the people, the circumstances, the conditions, all of the causes were included within that circle I state to you that the law is that if some part of that cause was the negligence of Mr. Cochran there can be no award of damages in this case.
>
> Mr. Richard Wait: We will object to that as not being the law and the court will not so instruct the jury. This is improper argument.
>
> The Court: Counsel has the instruction or should have the text of the instruction. If the negligence of Mr. Cochran contributed as a proximate cause to the accident. You left the word "proximate" out in your argument, counsel.
>
> Mr. Eugene Wait: Excuse me, your Honor. I will write it in.

The court will tell you what the words "proximate cause" mean. "Proximate cause" means—well, I won't define it because the court will tell you—but if all the proximate causes of the accident are included within this circle and even one percent——

Mr. Richard Wait: I will object to that, if the court please. This is not the law, and we object to it.

Mr. Eugene Wait: It is not the complete statement of the law yet, your Honor.

The Court: Go ahead and finish your argument, counsel.

Mr. Eugene Wait: If one percent of the causes, of the proximate causes, of this accident are the negligence of Mr. Cochran you may not award damages to the plaintiff.

If it [is] your duty to follow that law, and we submit that our analysis of the factual will lead you to conclude (1) that Mr. Delizio did look, (2) that the Cochran car was over half a block away, (3) that he then had the right-of-way to proceed, and did proceed, (4) that Mr. Cochran did not keep a lookout, he either didn't look or he didn't see what was obvious to be seen, namely, that Mr. Delizio was proceeding into the intersection, that he failed to keep a lookout, he failed to take any precaution to avoid the accident, he was negligent, and that his negligence was one of the proximate causes of this accident, and therefore you are duty bound by your oaths as jurors to bring in a verdict for the defendant. (T 2A, 44-47)

The Court further instructed the jury on this subject as follows:

The defendant claims contributory negligence and to establish the defense of contributory negligence the burden is upon the defendant to prove by a prepon-

derance of the evidence that the plaintiff or the driver of the car in which the plaintiff was riding, that is, her husband, was negligent, and that such negligence contributed as a proximate cause of the injury. . . . (T 422)

The burden is on a defendant alleging the defense of contributory negligence to establish by a preponderance of the evidence in the case the claim that the plaintiff herself or the driver of the car, her husband, was also at fault and that such fault contributed (as) one of the proximate causes of any injuries and consequent damages plaintiff may have sustained. (T 424)

The exceptions and objections to these jury instructions were included in those previously set forth above and "deemed by the court to be completely made" with respect to imputation of negligence to the Plaintiff. (T 386)

II. The Court's Instructions on the Definition and Subject of Contributory Negligence, and Especially With Reference to "Some Degree" of Contributory Negligence, Were Prejudicial Error.

The Court instructed the jury as follows:

In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, that some contributory negligence on the part of the plaintiff herself, or the driver of the car in which she was riding, was a proximate cause of any injuries and consequent damage which the plaintiff may have sustained.

Contributory negligence is fault on the part of a person injured, in this case the plaintiff or the driver of the car, which cooperates in some degree with the

negligence of another, and so helps to bring about the injury.

By the defense of contributory negligence, the defendant in effect alleges that even though the defendant may have been guilty of some negligent act or omission which was one of the proximate causes, the plaintiff herself or her husband by her failure or his failure to use ordinary care—and that term will be defined to you in a moment—under the circumstances for her own safety at the time and place in question also contributed one of the proximate causes of any injuries and damages the plaintiff may have suffered. (T 423-424)

These instructions were excepted and objected to by Plaintiff's counsel as follows:

Finally at 73.21 we submit to the court that this is erroneous. . . . 73.21. It reads as follows: 'In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, that some contributory negligence on the part of plaintiff,' and in this case the court has indicated a modification to read 'the driver.'

The Court: Some contributory negligence on the part of the driver of the Cochran automobile?

Mr. Richard Wait: Yes.

Now, your Honor, that isn't the law. There isn't any case that supports the giving of that instruction, that there is some contributory negligence.

The Court: Doesn't it go on there and say that that contributory negligence has to be contributed as one of the proximate causes?

Mr. Richard Wait: Yes.

The Court: All right. Then that clears it.

> Mr. Richard Wait: And we have no instruction that says just some negligence is enough for the plaintiff to recover from the defendant. (T 415-416)

Following the giving of the instruction by the Court, Defendant's counsel argued that one percent of the proximate causes was sufficient under the Court's instruction to constitute contributory negligence, barring plaintiff's recovery. The following statements and objections were made in Defendant's oral argument:

> Mr. Eugene Wait: This is a fiction, of course, but if all of the causes of this accident could be included within the circle I have just drawn, all of the causes, all of the people, the circumstances, the conditions, all of the causes were included within that circle I state to you that the law is that if some part of that cause was the negligence of Mr. Cochran there can be no award of damages in this case.
>
> Mr. Richard Wait: We will object to that as not being the law and the Court will not so instruct the jury. This is improper argument.
>
> * * * *
>
> Mr. Eugene Wait: . . . The Court will tell you what the words "proximate cause" mean. "Proximate cause" means—well, I won't define it because the Court will tell you—but if all the proximate causes of the accident are included within this circle and even one percent——
>
> Mr. Richard Wait: I will object to that if the Court please. This is not the law, and we object to it.
>
> Mr. Eugene Wait: It is not the complete statement of the law yet, Your Honor.
>
> The Court: Go ahead and finish your argument, counsel.

Mr. Eugene Wait: If one per cent of the causes, of the proximate causes of this accident are the negligence of Mr. Cochran you may not award damages to the Plaintiff. (T 2A 45-46)

The Court also instructed the jury on the subject of contributory negligence as follows:

The issues to be determined by the jury in this case are these:

First: Was the defendant negligent?

If your unanimous answer to that question is 'No,' you will return a verdict for the defendant; but if your unanimous answer is 'Yes,' you then have a second issue to determine, namely:

Second: Was the negligence of the defendant a proximate cause of any injury or damage to the plaintiff?

If your unanimous answer to that question is 'No,' you will return a verdict for the defendant; but if your unanimous answer is 'Yes,' then you must find the answer to a third question, namely:

Third: Was the plaintiff or her husband guilty of any contributory negligence?

If you should unanimously find that he or she was not, then, having found in plaintiff's favor in answer to the first two questions, you will determine the amount of plaintiff's damages and return a verdict in the plaintiff's favor for that amount.

On the other hand, if you should unanimously find, from a preponderance of the evidence in the case, that the plaintiff or her husband was guilty of some contributory negligence, and that plaintiff's or her husband's fault contributed as a proximate cause of any injuries which plaintiff may have sustained, you will not be concerned with the issue as to damages, but will return a verdict for the defendant. (T 424-425)

Exceptions and objections were made to this instruction on behalf of Plaintiff as follows:

> I don't think there is any evidence of negligence on the part of the plaintiff. (T 383)
>
> That is repetitive, . . . is it not, in three places? We think so.
>
> The Court: I have been trying to write instructions for 50 years, and I have read a lot of them, and I have not found anybody yet who can get a complete set of instructions without being repetitive somehow.
>
> So I will give 73.18 of Mathes, 73.21 and 73.23.
>
> Mr. Richard Wait: Your Honor, at what state under your procedure are we expected to make formal exceptions?
>
> The Court: Right now as we go along, as I pass each instruction.
>
> Mr. Richard Wait: Because, you see, I don't have the Mathes book and I have assumed that I should examine this and make a record of it at the end. (T 382-385)

The Court further instructed the jury:

> The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant. (T 425-426)

Exceptions and objections were made to this instruction as follows:

> Mr. Richard Wait: I should like to make an exception to some of the instructions.
>
> The Court: Very well.

Mr. Richard Wait: To the first proposed instruction the court indicated it would give, 71.01, we respectfully submit that the proposed instruction submitted by the court adequately covers the subject and, more important than that, this specific instruction we think is prejudicial to the plaintiff in that it reads that the burden is on the plaintiff in a civil action such as this to prove every essential element of his claim.

Now the jury doesn't know what every essential element is, your Honor, and this puts too great a burden upon the plaintiff, and it puts too great a burden upon the jury to know what every essential element of this claim is.

Secondly, it says if the proof should fail to establish any essential element of plaintiff's claim, and the court has not in any of the jury instructions told the jury what every essential element is, and a juror who listened to this instruction given might be confused and might think that some essential element hadn't been proved, and we submit that there is no necessity for giving 71.01 and respectfully submit to the court that we delete it as covered by the other instructions. (T 412-413)

III. The Trial Court's Instructions on Contributory Negligence of Plaintiff and the Imputation of Her Husband's Alleged Negligence as Driver of the Car Prejudicially Accentuated the Duty of Plaintiff and Minimized the Duty of Defendant, Were Prejudicially Cumulative, Unbalanced, Repetitious and Given in Erroneous Order Prior to Instructions on Defendant's Duties of Care Referable to Defendant's Conduct and Had a Prejudicial Influence and Impact Upon the Jury.

The Court's Instructions given at the very outset of its charge, after stock instructions 1, 2 and 3, are set forth on pages ii-iv of the Appendix.

The repetitiveness of the instructions on contributory negligence and imputation of negligence of Plaintiff's husband as the driver of the car were referred to throughout the settlement of the jury instructions. (T 385, 388-390, 413-416)

In addition, the following specific objections were made and proceedings took place during the course of the settlement of the jury instructions:

> Mr. Richard Wait: Before we get off the subject, we will object to the order of giving the instruction on the duty of care of the rider in an automobile before the instructions of the court given with relation to the applicability to the defendant.
>
> The Court: It doesn't make any difference. We don't get to negligence as a definition or any of the duties of care with regard to the defendant or even an instruction on ordinary care until instruction No. 8. Where do you want me to put it in?
>
> Mr. Richard Wait: Somewhere after the definition of contributory negligence.
>
> The Court: That is just what I did. It just follows contributory negligence.
>
> Mr. Richard Wait: We submit that the duty of care and the instructions with respect to negligence, the conduct of the defendant, that that logically should precede any claims of contributory negligence of a passenger in an automobile, and we would respectfully submit that it should come somewhere around 18-A or 19-A, which follows the instruction with respect to the duties of both drivers since the passenger's duty necessarily follows the duty of the driver in logical order. (T 388)

During the course of settlement of the jury instructions (T 340-417) the Court at no time provided Plaintiff's

counsel with copies of the instructions which it intended to give from *Mathes & Devitt's Federal Jury Practice And Instructions—Civil and Criminal,* and counsel for Plaintiff had no opportunity to inspect those instructions while they were being settled (T 385-386), nor was the order of the instructions which the Court intended to give ever presented to Plaintiff's counsel in order to object to the total prejudicial effect that they would have upon the jury. After reading some of the individual instructions from *Mathes & Devitt's* edition proposed to be given by the trial court, Plaintiff's counsel made specific objection to particular instructions, but was not informed of the order in which they would be given at any time before the jury instructions were actually read by the Court. (T 412-419)

IV. The Trial Court Committed Prejudicial Error in Instructing the Jury on the Presumption of Due Care of a Party (That the Law Has Been Obeyed) Where Evidence and Testimony of That Party Was Introduced at the Trial, and That Such Presumptions Must Be Overcome or Outweighed by Evidence in the Case.

The Court instructed the jury as follows:

> Presumptions are deductions or conclusions which the law requires the jury to make under certain circumstances, in the absence of evidence in the case which leads the jury to a different or contrary conclusion. A presumption continues to exist only so long as it is not overcome or outweighed by evidence in the case to the contrary; but unless and until the presumption is so outweighed, the jury are bound to find in accordance with the presumption.
>
> Unless and until outweighed by evidence in the case to the contrary, the law presumes that a person

is innocent of crime or wrong; that official duty has been fair and regular; that the ordinary course of business or employment has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed. (T 429)

Exceptions and objections were made to these instructions, after quoting them, as follows:

We don't think that part should be given in this case. We think that the evidence has dispelled or eliminated any presumptions. The State of Nevada does not have the same laws as the State of California, and we think for the jury to be given that instruction is improper.

The Court: You mean those presumptions are not correct?

Mr. Richard Wait: Excuse me?

The Court: You mean those presumptions did not exist?

Mr. Richard Wait: Not in this case. (T 414)

V. The Trial Court Erred in Instructing the Jury That a Violation of the Reno City Ordinance Created Only a Presumption of Negligence as a Matter of Law Which Might Be Overcome by Evidence of the Exercise of Ordinary Care.

The Court instructed the jury as follows:

A violation of that ordinance of the City of Reno or state law which I have just read to you creates a presumption of negligence as a matter of law.

However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, you find by a preponderance of the evidence that the driver with which you are immediately concerned did what might reasonably be expected of a person of

ordinary prudence, acting under similar circumstances, who desired to comply with the law. (T 435-436)

Exceptions and objections to this instruction were made as follows:

Mr. Richard Wait: Insofar as the plaintiff is concerned, your Honor, we submit that there is no evidence under the circumstances which could constitute a rebuttal for vanishing of the presumption of negligence arising in this case in the violation of the defendant, and we think that the instruction is erroneous.

The Court: The exception is overruled. (T 394)

The Court also instructed the jury:

The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care.

Whether that rate of speed is a negligent one is a question of fact, the answer to which depends on all the surrounding circumstances.

The basic speed law of this state as provided by Section 484.060 of the Nevada Revised Statutes is as follows:

'. . . it shall be unlawful for any person to drive or operate a vehicle of any kind or character . . . at a rate of speed greater than is reasonable and proper, having due regard for the traffic, surface and width of the highway; or . . . at such a rate of speed as to endanger the life, limb or property of any person.' (T 435)

Exceptions and objections to this instruction were made as follows:

The Court: Is there an exception?

Mr. Wait: Yes, your Honor.

The Court: On the ground that it is not the law?

Mr. Richard Wait: On the ground that the Nevada Revised Statutes are not applicable and that the instruction on the subject of speed is improper. The evidence before the jury already is that for traffic on Fifth Street there is a 25 mile speed limit, and we think that any instruction on speed should be the city ordinance to the effect that it is 25 miles per hour.

The Court: Your exception is overruled. (T 393-394)

VI. There Was a Total Failure by Defendant to Plead the Affirmative Defense of Passenger Contributory Negligence, and the Evidence Was Insufficient to Support the Giving of Said Instruction.

In addition to the numerous instructions set forth above concerning alleged contributory negligence on the part of Plaintiff Lois Cochran, the Court also instructed the jury as follows:

> The rider in a vehicle being driven by another has the duty to exercise ordinary care for her own safety. This duty, however, does not necessarily require the rider to interfere in any way with the handling of the vehicle by the driver or to give or attempt to give the driver advice, instructions, warnings or protests. Indeed, it would be possible for a rider to commit negligence by interfering with or disturbing the driver.
>
> In the absence of indications to the contrary, either apparent to the rider or that would be apparent to her in the exercise of ordinary care, the rider who herself is not negligent has a right to assume that the driver will operate the vehicle with ordinary care.

However, due care generally requires of the rider that she protest against obvious negligence of the driver, if she has reasonable opportunity to do so.

But the manner in which the rider must conduct herself to comply with the duty to exercise ordinary care depends on the particular circumstances of each case; and in the light of all those circumstances the jury must determine whether or not the rider acted as a person of ordinary prudence and exercised ordinary care. (T 438)

Exceptions and objections were specifically made as previously set forth hereinabove. (T 383-388)

VII. The Court Erred in Admitting Evidence of a Claim Made by Defendant's Passenger Ada Schaeffer Against Plaintiff and Her Husband and That the Claim Had Been Closed.

During the course of the trial Defendant offered and read into evidence the deposition of Ada Schaeffer, a passenger in the right front of Defendant Mario Delizio's 1953 Ford automobile, which included the following:

Q. Okay. As a result of these injuries did you make a claim against Mr. and Mrs. Cochran?

A. Well, yes, there was a claim.

Q. Is that claim presently pending?

A. No, it's closed. (T 311)

The objection thereto had been previously made and overruled, as follows:

Mr. Richard Wait: We will object to the witness saying she was in sort of a daze, starting at page 10 at line 26, and with reference to the injuries and the insurance and the settlement of the claim of this witness, which takes us through page 11, line 25, and we respectfully submit that to admit that evidence would

be entirely prejudicial to the plaintiff in this case with respect to claims made by an independent witness who is not a party to the action. (T 261-262)

* * * *

Mr. Richard Wait: Your Honor, may I respectfully submit to the court that the ruling should include back to line 16 as to the claim against the Cochrans because this witness in this courtroom could not come up to this witness stand and testify as a witness and include in her testimony that she had a claim pending against the Cochrans! The claim of any other party in that automobile is wholly immaterial and beyond the scope of the issues in this case as to Mrs. Cochran's right to recover against Mr. Delizio. And, your Honor, I think that the only fair thing in this case would be if there is going to be reference to injury that the claim be deleted which commences at line 16 through 20. (T 262-263)

* * * *

Now the clear purpose, your Honor, in this case is to show this injury, that someone else made a judgment that the Cochrans were at fault, that the Cochrans were wrong, and that some amount of money was paid to this passenger in this automobile. (T 264)

ARGUMENT

I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT ANY NEGLIGENCE OF PLAINTIFF'S HUSBAND AS DRIVER OF THE CAR WAS IMPUTABLE TO PLAINTIFF.

It is readily apparent from the record that this case has absolutely nothing to do with the "family purpose doctrine," yet the only authority urged upon the trial court for the giving of the imputed negligence instruction

was Nevada's family purpose statute, N.R.S. 41.440. (This statute, plus its supplementary sections, N.R.S. 41.450 and 41.460, are set forth in full at page i of the Appendix.)

A cursory review of said statute reveals that it is a typical family purpose statute, imposing joint and several liability upon the owner and the other members of the immediate family involved in a motor vehicle accident. The purpose of such a statute essentially is the public policy of placing the responsibility for the operation of an automobile being used for family purposes upon the owner thereof. *Bartek v. Glasers Provisions Co.*, 160 Neb. 794, 71 N.W.2d 466 (1955). It is applicable only to specific and limited situations (as indicated by the fact that it has never once been cited by an appellate court despite its 11 year existence) and is not even remotely connected to the present case. It is not an "ownership statute," such as that of California and many other jurisdictions, which statutes are much broader, imposing liability upon the owner for the negligence of *any* permissive user.

Nevada does not have an ownership statute and, irrespective of any statute, the case law in Nevada makes it abundantly clear that the negligence of the husband *cannot* be imputed to the wife in a situation as presented herein.

The leading case is *F. & W. Construction Co. v. Boyd,* 60 Nev. 117, 102 P.2d 627 (1940) involving a factual situation virtually identical to the present case, wherein the wife was a passenger in an automobile driven by her husband, and in which she sought damages for injuries incurred by the negligence of a third party. On appeal,

the Court stated the issue to be whether the contributory negligence of the husband can be imputed to the wife in the State of Nevada.

The Court held, at p. 123, "that the contributory negligence of the husband *cannot* be imputed to the wife in this state." Initially it was pointed out that six of the eight community property states that had passed on the question, including California, had held that the husband's contributory negligence *could* be imputed to the wife, apparently because in those states the wife's recovery of damages for personal injuries is community property, the rationale being that the wrongdoing husband should not be permitted to share in the proceeds. Despite this authority, the Court stated, at p. 120:

> Ordinarily, such an array of reputable authority would almost at once persuade us to follow the same course. But careful analysis has led us to the conviction that in the beginning the course was charted wrong, and 'there is no sufficient ground of justice or social policy to refuse the innocent wife any and all recovery because of the husband's contributory negligence.' (24 Cal. Law Review 741)

The Court then held that the recovery of the wife for her personal injuries was her separate property.

It is important to note that N.R.S. 41.440, .450 and .460 became effective July 1, 1957. Yet the case of *Lee v. Baker,* 77 Nev. 462, 366 P.2d 513 (1961), decided four years later and which is directly in point, does not even mention the above statute. It involved a two-car automobile accident, one car driven by Baker and the other by Lee. The plaintiffs, Robert Baker, his wife and their

daughter, all brought suit against the adverse driver. Defendant's answer set forth the affirmative defense of contributory negligence on the part of Robert Baker, alleging that his contributory negligence was imputable to his wife Alma Baker and to Marva, the daughter. The jury found in favor of the wife and the daughter but against the husband's claim for personal injuries, apparently because of his own contributory negligence. The Court held, at p. 465:

> The jury properly was instructed that any negligence of Robert E. Baker was not imputable to his wife or daughter. Therefore, a verdict in their favor for their own personal injuries could be upheld * * * regardless of any negligence on the part of Robert E. Baker * * *.

As authority for the above holding the Court cited *F. & W. Construction Co. v. Boyd, supra.*

Cook v. Faria, 74 Nev. 262, 328 P.2d 568 (1958) involved an action by an automobile passenger against the driver and the driver's husband, who also was a passenger. The automobile was referred to by the husband and wife as "our car" and was conceded to be owned by both defendants. After pointing out that there was a complete absence of any evidence to the effect that the husband, Charles Cook, took any part in directing his wife's operation of the vehicle, the Court held at p. 263:

> Judgment against Charles Cook can, therefore, be supported only if his wife's negligence can be imputed to him. *The doctrine of such imputed negligence has never been adopted in this state.* (Emphasis supplied.)

(The *Cook* decision was rendered August 11, 1958, more than a year after the enactment of N.R.S. 41.440.)

The most recent pronouncement on this subject is *Morrissett v. Morrissett*, 80 Nev. 566, 397 P.2d 184 (1964) where Justice Thompson reiterates the principle of law in Nevada against imputing negligence of the spouse-driver to the spouse-guest to bar relief, citing *F. & W. Construction Co. v. Boyd, supra.*

The Court of Appeals for the Ninth Circuit has also pointed out that it is the law of Nevada that the contributory negligence of a husband is no bar to a recovery by the wife, stating in *King v. Yancey,* 147 F. 2d 379 (9th Cir. 1945), in footnote 2 on p. 380:

> In Nevada, while the husband must join in a suit for injury to the wife, the damages recovered for the injury belong to the wife alone. Negligence or fault of the husband is no bar to recovery. *Fredrickson & Watson Const. Co. v. Boyd*, 60 Nev. 117, 102 P.2d 627.

The annotation in 35 A.L.R.2d 1199, 1231, entitled: "Spouse's Cause of Action for Negligent Personal Injury As Separate or Community Property" states:

> Under the law of Nevada contributory negligence of a husband constitutes no bar to an action by his wife to recover damages for her personal injuries. (Citing Fredrickson & Watson and King v. Yancey.)

Thus it is clear that it is the law in Nevada that Lois Cochran's cause of action for personal injuries was her own separate property and that any negligence of her husband is not imputable to her, irrespective of the form of ownership of the automobile. N.R.S. 41.440 clearly is

inapplicable and has nothing whatsoever to do with the situation presented herein, as is evidenced by the Nevada authorities cited above.

As for authorities from other jurisdictions, *Bartek v. Glasers Provisions Co.,* 160 Neb. 794, 71 N.W.2d 466 (1955), supra, involved an intersection collision wherein the plaintiff was the owner of and riding in a car operated by her husband. Defendants requested the trial court to instruct the jury that the negligence, if any, of the husband was imputable to the wife on the basis, among others, of the family purpose doctrine. The Court held, at p. 473:

> The family purpose doctrine does not have for its objective the purpose of defeating a claim for damages by a guest by imputing the negligence of a driver to such guest but rather to impose upon the owner of a car being used for family purposes the responsibility for its operation as a matter of public policy. It has no application here.

Brower v. Stolz, 121 N.W.2d 624 (N.Dak. 1963) involved an automobile collision at an uncontrolled intersection. Plaintiff's automobile was being operated by his wife and he sought damages from the third party for the damage to his automobile. Defendant sought to invoke the family purpose doctrine so as to impute the contributory negligence of the wife to the plaintiff owner and thereby preclude recovery. The Court held as follows, at p. 627:

> The family purpose doctrine has no application to a case where the owner of a family automobile seeks to recover for damages proximately caused by the negligence of the operator of another automobile,

> even though the family member driver may have been contributorily negligent.

See also *Michaelsohn v. Smith*, 113 N.W.2d 571 (N.Dak. 1962).

The Iowa Supreme Court in *McMartin v. Saemisch*, 116 N.W.2d 491 (Iowa 1962) refused to apply the family purpose statute to impute the negligence of the wife-driver to the husband-owner, and held that the family purpose statute was intended to protect third parties from the negligence of the bailee-driver of another's car but was not intended to relieve such third parties from the consequences of their own negligence.

The leading case of *Christensen v. Hennepin Transp. Co.*, 215 Minn. 394, 10 N.W.2d 406 (1943) involved an automobile collision wherein the plaintiff's wife was riding in a vehicle in which she was a co-owner, the vehicle being driven by the co-owner husband. The defendant sought to impute the husband's contributory negligence to the wife, both on the common law grounds and pursuant to the Financial Responsibility Statute. The trial court gave an imputed negligence instruction and was reversed by the Minnesota Supreme Court, holding that the husband's negligence was not imputable to the plaintiff wife simply because she, as co-owner, consented to his driving the automobile.

As for the common law theory, the Court held that the right of control is the key factor and stated at p. 413:

> Nor is the husband driver necessarily the agent or servant of his wife passenger, even in those cases where the wife herself has purchased the car with her own funds and has registered her ownership.

> The husband is still the head of the family, and when he is at the wheel of that car, even with his wife present, the presumption is that he is in control of the car, and, in the absence of evidence to the contrary, he is solely responsible for its operation. Ownership of a car does not necessarily mean control of that car, any more than ownership of any other property necessarily means control of it.

The Court further stated the correct rule to be as follows, at p. 414:

> Where a husband and a wife are co-owners of an automobile which one of them is driving and in which the other is riding at the time of a collision, the contributory negligence of the driver is not imputable to the other as a matter of law simply because of co-ownership nor because of marital relationship.

The Court further held that the financial responsibility statute, making the permissive user the agent of the owner, was merely intended to provide an injured plaintiff with a solvent defendant and refused to construe the statute so as to impute the negligence of the driver to an owner-plaintiff.

For a number of years, courts throughout the United States have recognized the gross injustice of the whole doctrine of imputation of negligence. A legal principle which permits a woman to be barred from any kind or type of recovery of damages for physical injuries suffered without any personal fault or blame on her part smacks of the rankest type judicial unfairness. The following cases refuse to invoke such a legal doctrine: *Jacobsen v. Dailey,* 36 N.W.2d 711 (Minn. 1949); *Universal Under-*

writers Insurance Co. v. Hoxie, 375 Mich. 102, 133 N.W. 2d 167 (1965); *Weber v. Stokely-Van Camp, Inc.,* 144 N.W.2d 540 (Minn. 1966); *Jasper v. Freitag,* 145 N.W.2d 879 (N.Dak. 1966); *Jenks v. Veeder Contracting Co.,* 177 Misc. 240, 30 N.Y.S.2d 278 (1941); *New York Telephone Co. v. Scofield,* 31 N.Y.S.2d 393 (1941); *Petro v. Eisenberg,* 207 Misc. 380, 138 N.Y.S.2d 705 (1955).

II. THE COURT'S INSTRUCTIONS ON THE DEFINITION AND SUBJECT OF CONTRIBUTORY NEGLIGENCE, AND ESPECIALLY WITH REFERENCE TO "SOME DEGREE" OF CONTRIBUTORY NEGLIGENCE, WERE PREJUDICIAL ERROR.

A. The Definition of Contributory Negligence is Erroneous as a Matter of Law and is Contrary to the Law of the State of Nevada.

The Court gave the following definition of contributory negligence:

> "Contributory negligence is fault on the part of a person injured, in this case the plaintiff or the driver of the car, which *cooperates in some degree* with the negligence of another, and so *helps* to bring about the injury." (T 423; emphasis added)

In contrast, the Nevada Supreme Court defines contributory negligence as follows:

> "Contributory negligence is such an act, or omission of precaution, on the part of the plaintiff, amounting in the circumstances to such want of ordinary care as, taken in connection with the negligent act or omission of precaution on the part of the defendant, proximately contributes to the injury complained of."

Musser v. Los Angeles & S.L.R. Co., 53 Nev. 304, 299 P. 1020 (1931).

The substantive differences between the two definitions are tremendous and the prejudicial effect upon the plaintiff is patently obvious.

The instructions given by the court contained repetitious and unwarranted reiteration as to contributory negligence; however, the charge to the jury contains but one definition of contributory negligence, as quoted above. Appellant submits that said instruction does not correctly state the law and is clearly prejudicially erroneous, as was so held in *Leichner v. Basile,* 394 P.2d 742, 743, 744, 745 (Mont. 1964) containing virtually the identical definition. The instruction objected to by plaintiff in the *Leichner* case is as follows:

> "Contributory negligence is negligence on the part of the person injured which *cooperating in some degree* with the negligence of another *helps* in proximately causing the injury of which the plaintiff thereafter complains." (Emphasis supplied by the court.)

The court then held, at p. 744:

> We agree with plaintiff that this was not a correct statement of the law of contributory negligence. The trial court in defining the causal relationship used the words 'cooperating in some degree' and 'helps.' This has never been the standard as plaintiff's negligence must directly relate to the injury, i.e., be the proximate cause thereof. The jury could well have concluded from the instruction that the negligence of plaintiff, if any, contributed remotely to the injury, and that therefore, plaintiff was guilty

> of contributory negligence. The use of the words 'cooperating in some degree' and 'helps' was not a proper standard as it must contribute immediately and as a proximate cause. (Citing cases)

Defendant apparently argued that all of the instructions must be read together, and this cured any possible error. The court then referred to the case of *Wolf v. O'Leary, Inc.*, 132 Mont. 468, 318 P.2d 582, holding that notwithstanding the fact that one of the instructions on contributory negligence did correctly define contributory negligence, such an instruction did not correct the erroneous one. The court then stated:

> In the instant case, unlike the Wolf case, there is only one instruction defining contributory negligence for the jury, and it was erroneous. There was no other instruction to look to for guidance as the jury may have done in the Wolf case. If plaintiff was prejudiced in the Wolf case by having one erroneous instruction and one corrected instruction on contributory negligence, plaintiff was surely prejudiced in the instant case where only one instruction was given defining contributory negligence, it being erroneous and not a correct statement of the law.

The trial court in the *Leichner* case also gave an instruction setting forth the issues to be resolved by the jury, including that of contributory negligence, which instruction was very similar to that given in the present case (T 424-425) The court pointed out that although that instruction did state the issue of contributory negligence for the jury it did not define it, and it was not sufficient to correct the error in the instruction defining contributory negligence.

Another very similar instruction was held to be prejudicially erroneous in *Willhide v. Biggs*, 188 S.E. 876 (W. Va. 1936), at pp. 877-8:

> The court instructs the jury that contributory negligence is such negligence on the part of the plaintiff *as helped to produce the injury complained of,* and if the jury finds from all the evidence in this case that the plaintiff was guilty of *any* negligence that *helped* bring about or produced the injuries complained of, then your verdict should be for the defendants. (Emphasis added)

The plaintiff contended that the standard of *any* negligence that *helped* to produce the injuries complained of is not correct and that it set up too severe a test. The Appellate Court agreed, holding that it was error to give said instruction, stating at p. 878:

> The instruction under consideration tells the jury that the plaintiff may not recover if her decedent was guilty of 'any' negligence, with the further element that such negligence, to defeat recovery, must have 'helped' to bring about the injuries which resulted in the death of the plaintiff's decedent. The case of *State v. Surety Co.* (more correctly styled State ex rel. Myles, Administrator, v. American Surety Co.), 99 W. Va. 123, 127 S.E. 919, we think makes it perfectly clear that this is not a statement of the correct rule.

Appellant respectfully submits that the present instruction also is an incorrect statement of the law, is confusing, sets up too severe a test, and was prejudicially erroneous.

B. The Contributory Negligence Instruction Containing the Phrase "Some Degree" Was Prejudicially Erroneous.

The annotator of a recent annotation in 87 A.L.R.2d 1391, 1396, 1421 entitled "Propriety And Prejudicial Effect of Instructions Referring To The Degree or Percentage of Contributory Negligence Necessary To Bar Recovery," states:

> Considered from the point of view of pure logic, however, this harsh application of the rule of contributory negligence is as contradictory as it is socially undesirable. Accepting as a definition of negligence any conduct amounting to a want of ordinary care under the circumstances, it is at once apparent that it cannot involve slightness, greatness, or other gradations of intensity, and that an individual is either wholly within the exercise of ordinary care or he is entirely without it.
>
> * * * *
>
> As a general proposition, error in an instruction importing a division of contributory negligence into degrees or percentages or impugning the requisite causation is prejudicial or reversible error.

The leading case of *Bahm v. Pittsburgh & Lake Erie Rd. Co.*, 6 Ohio St.2d 192, 217 N.E.2d (1966) is directly analogous to the present case. There was a jury verdict for defendant in a negligence case and on appeal the issue was stated as follows, at p. 219:

> The sole question presented in this case is whether inclusion of the words, 'in any degree' in a charge on contributory negligence constitutes prejudicial error.

After overruling portions of three earlier opinions, the Court held, at p. 221:

> In conclusion we hold that the phrase 'in any degree' or the phrase, 'in the slightest degree,' constitutes prejudicial error to the plaintiff when used in connection with the charge to the jury respecting contributory negligence.

The Court also pointed out, at p. 220:

> Thus the essential element of contributory negligence (other than proximate causation) requisite to bar recovery by the plaintiff is not the comparative extent or degree of negligence, but the existence of negligence itself, for negligence by its very terms either does exist or does not exist. Therefore, a use of the phrase 'in any degree,' intended to modify contributory negligence in a charge to a jury constitutes prejudicial error inasmuch as it tends to confuse a jury and invite a comparison of the relative amount of negligence attributable to the parties involved.

Rainier Heat & Power Co. v. City of Seattle, 193 P. 233 (Wash. 1920) held that a contributory negligence instruction containing the phrase "contributed in any manner" was erroneous, and the case was reversed and remanded.

Howard v. Scarritt Estate Co., 194 S.W. 1144, 1145 (Mo. 1915) held that a contributory negligence instruction containing the phrase "least degree" was erroneous holding:

> We think it is evident from a mere casual reading that the above instruction is erroneous, and that the giving of it alone was a sufficient warrant for the action of the learned court in setting aside the verdict for defendant.

See also *Enyeart v. Waddle,* 191 N.E.2d 583 (Ohio 1962), and *Clark v. State,* 222 P.2d 300 (Cal. 1950), both holding the phrase "slightest degree" to be erroneous and prejudicial to Plaintiff.

In *Willert v. Nielsen,* 146 N.W.2d 26, 31 (N.Dak. 1966), an automobile-pedestrian case in which a jury verdict for the defendant was returned, plaintiff contended that the giving of an instruction on contributory negligence containing such words as "though slight" was prejudicial error. After referring to an earlier decision disapproving of a similar type instruction, the Court held:

> Having disapproved the instruction, it is now time to give meaningful effect to the disapproval. We therefore conclude that the giving of this instruction in the instant case was prejudicial error.

To the same effect see *Mack v. Precast Industries, Inc.,* 369 Mich. 439, 120 N.W.2d 255 (1963).

An important case, and one which is directly in point, is *Devine v. Cook,* 3 Utah 2d 134, 279 P. 2d 1073 (1955). The annotator of 87 A.L.R. 2d 1391, 1448 cited and summarized the case as follows:

> In a well-reasoned opinion, possibly representative of the trend of modern judicial thought, the Utah Supreme Court held it erroneous to instruct that the plaintiff would be barred from recovery if his own negligence proximately contributed to any extent, however slight, to produce his injury, further disapproving the phrases 'to any extent,' 'however slight,' and 'in any degree,' whether used in connection with the degree of proximate cause or the degree of negligence itself.

In *Perkins v. Kansas City Southern Ry. Co.,* 49 S.W. 2d 103 (Mo. 1932) a verdict for defendant was reversed and plaintiff granted a new trial, the Supreme Court holding that use of the words "caused in any degree" in contributory negligence instructions was erroneous and prejudicial error.

In *Danner v. Weinreich,* 323 S.W.2d 746 (Mo. 1959), a judgment for defendant was reversed for the giving of a contributory negligence instruction containing the phrase "however slight," the court holding the instruction misstated the law, misdirected the jury and was prejudicial error. Another case to the same effect, also using the phrase "however slight," is *McCulloch v. Horton,* 74 P.2d 1 (Mont. 1937). See also *Pepsi-Cola Bottling Co. v. Superior Burner Service Co.,* 427 P.2d 833 (Alaska 1967), footnote 5 ("slight negligence").

In *Pignatore v. Public Service Coordinated Transport,* 26 N.J. Super. 234, 97 A.2d 690, 693 (1953), an automobile case, the trial court gave the following instruction:

> If you find, in your deliberations, that the plaintiff *in any degree, slight as that contribution may be,* contributed *in any way* to the happening of the accident that (sic) he would not be entitled to a verdict at your hands. (Italics supplied by court.)

The appellate court then reversed, holding the instruction to be manifestly erroneous.

C. The Reference in Defendant's Argument to "One Percent of the Proximate Causes" on the Part of Mr. Cochran Was Prejudicial Misconduct and Reversible Error.

The case of *Busch v. Lilly,* 257 Minn. 343, 101 N.W.2d 199 (1960), is directly in point. It also involved an inter-

section collision ultimately resulting in a jury verdict for defendant. After the jury had retired to deliberate it returned to the courtroom for additional instructions concerning contributory negligence. The trial court then instructed as follows:

> The law in this state says that if you are guilty of, let's say, five percent negligence in a case you cannot recover. That is the law in this state, putting it on a percentage basis.

The Minnesota Supreme Court held the above reference to percentages to be reversible error, stating: "This Court has repeatedly stated that no reference should be made in a jury charge to a comparative degree or percentage of negligence or contributory negligence."

Iwrey v. Fowler, 367 Mich. 311, 116 N.W.2d 722 (1962), held the following instruction to be objectionable:

> Under our law it does not make any difference if the defendant is 99.9% guilty of negligence, if the plaintiff driver is 1/10 of 1%, or in any way guilty of negligence that contributed to the accident he cannot recover.

The Court pointed out that such an instruction might have been interpreted by the jurors as barring recovery on the basis of negligence so slight as to be immaterial, or possibly on a finding of remote lack of due care as distinguished from negligence proximately contributing to the accident, and that the specific reference to stated percentages was confusing. See also *Macaruso v. Massert,* 190 A.2d 14 (R.I. 1963).

The instructions given in the present case, containing the words "some" contributory negligence and "some

degree," were used in an extremely damaging and prejudicial manner in the closing argument of counsel for Defendant: "and if the driver of the Cochran car was negligent and his negligence contributed in *some* degree to this accident, there can be no recovery." (T 2a 44); "but the law is you cannot give five cents of damages in this case if Mr. Cochran was negligent and his negligence was *some* part of the cause of the accident." (T 2a 45); "if all of the causes of this accident could be included within the circle I have just drawn, * * * I state to you that the law is that if *some* part of that cause was the negligence of Mr. Cochran, there can be no award of damages in this case." (T 2A 45)

The vice inherent in the giving of contributory negligence instructions referring to "degrees" or "percentages" is increased tremendously in a case such as the present one where the "one percent" was *imputed* to an innocent plaintiff. The unfairness is patently obvious.

III. THE TRIAL COURT'S INSTRUCTIONS ON CONTRIBUTORY NEGLIGENCE OF PLAINTIFF AND THE IMPUTATION OF HER HUSBAND'S ALLEGED NEGLIGENCE AS DRIVER OF THE CAR PREJUDICIALLY ACCENTUATED THE DUTY OF PLAINTIFF AND MINIMIZED THE DUTY OF DEFENDANT, WERE PREJUDICIALLY CUMULATIVE, UNBALANCED, REPETITIOUS AND GIVEN IN ERRONEOUS ORDER PRIOR TO INSTRUCTIONS ON DEFENDANT'S DUTIES OF CARE REFERABLE TO DEFENDANT'S CONDUCT AND HAD A PREJUDICIAL INFLUENCE AND IMPACT UPON THE JURY.

As mentioned above, the numerous instructions given by the trial court relating to contributory negligence are set forth in the Appendix, at pages ii, iii and iv.

During the settlement of jury instructions, Plaintiff's counsel reiterated the numerous objections and exceptions to the instructions on contributory negligence and imputation of negligence the Court proposed to give, and urged the trial court to soften the instructions on contributory negligence relating to Plaintiff and on imputed negligence. (T 382-385, 389, 416)

The gravity of the situation reached impossible heights when the trial court saw fit to take additional instructions on the subject of contributory negligence, and related instructions with regard to presumptions and the burden of proof, from *Mathes & Devitt*, 1965 Ed. Federal Jury Practice And Instructions, Civil and Criminal, and gave them at the outset of his instructions in a manner to make it clearly apparent to the jury that the main issues they were to decide were the imputation of negligence on the part of Plaintiff's husband as the operator of the 1964 Plymouth, and contributory negligence on the part of Plaintiff. Indeed, the record shows that all of the instructions initially read to the jury from page 422 to 429 of the Transcript of Testimony, on the issues of liability related solely to absence of negligence on the part of Defendant and were prejudically repetitive and emphasized contributory negligence and imputation of negligence of Plaintiff's husband as the driver of the Plymouth automobile, while at no time *ever* informing the jury of the duty of care owed by Defendant Mario Delizio.

The instructions set forth at pages ii, iii and iv of the Appendix demonstrate the terrible impact and effect upon Plaintiff's case through the prejudicial repetition and re-

iteration of the definitions and meaning of contributory negligence, imputed negligence, and recurring phrases solely referable to Plaintiff, Plaintiff's husband, and their fault, contributory negligence and imputed negligence.

The impact upon the jury of the Court's heavy emphasis and reiteration of contributory negligence at the outset of the Court's charge to the jury was overwhelming, and was so patently prejudicial to a fair evaluation of the evidence by the jury as to render the whole trial a sham and a farce. All of the instructions on contributory negligence, as well as most of the other instructions contained in the Court's charges from pages 422 to 438, inclusive, were specifically excepted and objected to by Plaintiff's counsel, but no one could anticipate the devastating impact and effect upon the jury of the Court's utilization of additional instructions which it read from and did not make available to Plaintiff's counsel at the time jury instructions were settled the preceding day. (T 385)

Devine v. Cook, 3 Utah 2d 134, 279 P.2d 1073 (1955), supra, involved an automobile collision wherein the jury returned a verdict for defendants. The first error urged by plaintiffs was that the contributory negligence instructions prejudicially accentuated the duty of the plaintiffs and minimized the duty of the defendants. After a detailed analysis of the various instructions, the net result of which was extremely similar to that in the present case, the Court held, at p. 1077:

> "Even assuming that the instructions by the court taken in the entirety could be considered correct as given, the continual repetition of instructions on contributory negligence and the positive delineation of

> the duties of the plaintiffs, as contrasted with the qualified negative statements of the duties of the defendants, unbalanced the instructions in favor of the defendants and influenced the jury in bringing its verdict of no cause of action as against all three plaintiffs, and therefore constituted reversible error."

See also *Clark v. State,* 222 P.2d 300 (Cal. 1950).

Mack v. Precast Industries, Inc., 369 Mich. 439, 120 N.W. 2d 225, 229 (1963), supra, is extremely similar to the situation presented in the present case, inasmuch as the *Mack* case also dealt with the unnecessary repetition of instructions upon the subject of contributory negligence. The instruction involved therein stated that for the plaintiff to recover the jury must find that the decedent "was free of any negligence, however slight, which contributed to his injury." The words "however slight" were repeated sixteen times, six times during the main charge and ten times when the jury had returned to ask the court questions concerning contributory negligence. The Court held, at p. 229:

> We have consistently held that unnecessary repetition of the instructed burden-duty of one party or the other, in a typical negligence case, is of itself argumentatively prejudicial (citing cases). And I experience no difficulty in holding that such error is compounded unto reversible error when the matter thus repeated—sixteen times—is of itself tacitly conceded (by the dissenting Justice) if not patent error. This Plaintiff, like the Dodo, never had a chance. Her decedent by repeated instruction was held to a high or extraordinary degree of common law care on penalty of verdict against her; whereas the defendants were held only to the duty to exercise that de-

> gree of care which the common law exacts generally; that of ordinary or due care. The result was a verdict coerced by erroneous and prejudicial instruction, given repeatedly even after a visibly puzzled jury had twice requested definitive instruction on the subject of what is and what is not negligence and contributory negligence.

The majority opinion also took pains to point out the devastating influence argumentatively erroneous instructions, repeated for one side or the other, have upon jurors, men and women who have just taken an oath to "take the law from the court."

Numerous jurisdictions have held that instructions should not give undue emphasis to any particular phase of the case favorable to either side, and correct statements of the law, if repeated to the point of such undue emphasis, constitute reversible error. *Clarke v. Hubbell,* 86 N.W.2d 905 (Iowa 1957). See also *Shaw v. Congress Building, Inc.,* 113 So.2d 245 (Fla. 1959); *Minga v. Jack Cole Co.,* 12 Ill.App.2d 556, 140 N.E.2d 383 (1956); *Mitchell v. New York Central R. Co.,* 135 N.E.2d 423 (Ohio 1955); *Osmon v. Bellon Construction Company,* 53 Ill. App.2d 67, 202 N.E.2d 341 (1964).

The net effect of the repetition, accumulation and order of the contributory negligence instructions was devastating. The prejudicial effect of these instructions was further driven home by counsel for Defendant in his closing argument: "listen to the instructions of the Court on what should be done about a case where both of the drivers are wrong, and remember that you are required, whether you like it or not, whether you agree with the

law or not, you must follow what the Court tells you about what the law is." (T 2A 39); "regardless of what you personally believe the law is or ought to be. When you swore to try the case and discharge your duties as jurors, you swore to obey the law as the Judge gives it to you. You may not disregard it." (T 2A 40); "you are duty bound by your oath as jurors to bring in a verdict for the Defendant." (T 2A 47)

It is respectfully submitted that in view of these authorities and in simple fairness and justice to Plaintiff, the judgment must be reversed and remanded for a new trial.

IV. A. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE PRESUMPTION OF DUE CARE OF A PARTY (THAT THE LAW HAS BEEN OBEYED) WHERE EVIDENCE AND TESTIMONY OF THAT PARTY WAS INTRODUCED AT THE TRIAL.

The Court instructed the jury as follows:

> Presumptions are deductions or conclusions which the law required the jury to make under certain circumstances, in the absence of evidence in the case which leads the jury to a different or contrary conclusion. A presumption continues to exist only so long as it is not overcome or outweighed by evidence in the case to the contrary; but unless and until the presumption is so outweighed, the jury are bound to find in accordance with the presumption.
>
> Unless and until outweighed by evidence in the case to the contrary, the law presumes that a person is innocent of crime or wrong; that official duty has been fair and regular; that the ordinary course of business or employment has been followed; that things have

> happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed. (T 429)

A very similar instruction was given by the trial court in the frequently cited case of *Ford v. Chesley Transp. Co.,* 101 Cal.App.2d 548, 225 P.2d 997 (1950). The instruction to the jury was that each party was entitled to a presumption of law that every person . . . obeys the law, when there is other evidence that conflicts with such a presumption it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. The California appellate court declared (at p. 1000):

> It was error for the court to give the instruction which extended to defendant, also, the benefit of the presumption. The driver, Porter, testified fully concerning his conduct in backing the truck and trailer across the highway. The presumption may not be relied on by a party who can and does produce complete and explicit evidence as to his conduct in the premises. The authorities are unanimous to this effect.

In determining the question whether prejudice resulted to Plaintiff with respect to the presumption of due care being made available to Defendant the Court further declared (at pp. 1000-1001):

> The remaining question is whether it was prejudicial error to give defendant the benefit of the presumption that it exercised due care. We do not doubt that prejudice resulted.
>
> * * * *

It must be assumed that the jury in considering this issue, in accordance with the court's instruction, gave some weight to the presumption that defendant used due care. This gave the defendant a decidedly unfair advantage. To an extent that it is impossible to determine, application of the presumption tended to minimize in the minds of the jurors the dangerous nature of defendant's operation and the precautions that should have been taken.

* * * *

The jury could reasonably have determined that only a minimum of care was exercised and that defendant was guilty of negligence. But the jurors were confronted with the duty of applying the presumption in defendant's favor to offset this substantial evidence of negligence.

* * * *

But the jury, under the instruction, was told that the presumption existed in his favor and should be weighed as evidence even as applied to the facts found with relation to Porter's conduct. Herein lies the vice of the instruction.

* * * *

The presumption has no place in the determination of the question, whether certain acts or omissions, believed by the jury to constitute the conduct of a party, were or were not negligent. The effect of the instruction was to add strength to defendant's claim that it was free from negligence. The considerations pointing to negligence would have to overcome not only those pointing to a contrary conclusion, but also the presumption that defendant was not negligent. In our opinion the error in giving this instruction was clearly prejudicial.

After considering two other instructions, neither of which was found to be sufficiently erroneous to require reversal of the judgment, the appellate court specifically held that the instruction on the presumption of due care available to defendant was reversible error, requiring the judgment for defendant to be reversed and remanded upon the grounds that it was not improbable that the verdict would have been in plaintiff's favor, had that instruction not been given.

It is readily apparent that the *Ford* decision is direct authority for a reversal of the judgment in the principal case. The presumption of due care made available to Defendant Mario Delizio enabled the jury to consider it as evidence upon the questions of whether he stopped at the stop sign and thereafter yielded the right of way to traffic constituting an immediate hazard, as required by Reno City Ordinance 10-111. The instruction given in the principal case was highly prejudicial in its reiteration of the necessity for the legal presumption of due care to be overcome or outweighed by evidence introduced in the case to the contrary. Furthermore, the instruction was directive, mandatory and compulsory in its form, so that the jury was misled and given the impression it was obligatory to apply such a legal presumption of due care. Its language was:

> Presumptions are deductions or *conclusions which the law requires the jury to make* . . . but unless and until the presumption is so outweighed, the jury are *bound to find in accordance with the presumption* . . . *Unless and until outweighed by evidence in the case to the contrary, the law presumes* that . . . the law has been obeyed. (Emphasis added)

Thus the peremptory language contained in this instruction was far more harmful and prejudicial than that contained in the *Ford* case.

The principle of law that where a party has testified fully as to his acts and conduct immediately preceding and at the time of the accident, a trial court commits prejudicial error by instructing the jury on the presumption of due care, was expressly recognized, invoked and applied by the Supreme Court of California in *Laird v. T. W. Mather, Inc.*, 51 Cal.2d 210, 331 P.2d 617 (1958). The instruction was (set forth at p. 625):

> At the outset of this trial, each party was entitled to the presumption of law that every person takes ordinary care of his own concerns and that he obeys the law. . . .

The balance of the instruction on presumptions was in exactly the same form as that contained in *Ford v. Chesley Transp. Co., supra,* 101 Cal.App.2d 548, 225 P.2d 997 (1950). The Supreme Court of California declared (at p. 624):

> It is now settled that an instruction on the presumption should not be given when the party who seeks to invoke it testifies concerning his conduct immediately prior to or at the time in question. (Citing 14 California appellate decisions.)

In considering the question whether the error was prejudicial, the Court found it important that instructions supplementing those on the presumption of due care overemphasized that party's case who might invoke the benefit of the presumptions. In holding that the erroneous instruction may have tipped the scale in plaintiff's favor

in the deliberations of the jury requiring reversal of plaintiff's judgment in that case, the Supreme Court stated (at p. 624):

> The defendant was thereby forced to overcome by a preponderance of the evidence, not only plaintiff's case that she was free from contributory negligence, but also the presumption that she was acting with due care.

The same principle of law is applicable here. Plaintiff Lois Cochran was forced to overcome by a preponderance of the evidence, not only her burden of proof that defendant Mario Delizio negligently failed to stop at the stop sign and/or negligently failed to yield the right of way to the Cochran automobile as it approached the intersection, constituting an immediate hazard, but also was required by the trial court's instruction to "overcome" and "outweigh" the presumption that Defendant Delizio was acting with due care. Under the circumstances of this case, it is difficult to conceive of a more prejudicial jury instruction than that relating to the court's instructions on the presumption of due care.

Kline v. Southern Pacific Co., 21 Cal.Rptr. 233 (1965) involved instructions on the presumption of due care substantially the same as those in the other cited cases and in the principal case. In reversing the judgment for defendant upon the grounds that the presumption of due care was not available to defendant, and constituted prejudicial error, the California appellate court declared (at pp. 236-237):

> There is no corresponding presumption in favor of respondents since they fully testified and introduced

> evidence on their own behalf as to their acts and conduct immediately preceding and at the time of the accident.
>
> * * * *
>
> The presumption of due care never arose as to them. There being no such presumption, it was error for the court to instruct that respondents were entitled to the presumption of due care.
>
> * * * *
>
> Further, the giving of this instruction was prejudicial. The vice of giving the instruction under the circumstances was to give added weight to respondents' claim that they were free from negligence.

Numerous other cases might be cited herein and are referred to in the cases herein cited establishing that the legal presumption of due care given by the trial court in the principal case was prejudicial error to plaintiff, requiring reversal of the judgment upon this ground alone. Additional cases are: *Bertoli v. Hardesty,* 154 Cal.App. 2d 283, 315 P.2d 890; *Eastteam v. Hall,* 322 P.2d 577 (Calif. 1958); *Britton v. Gunderson,* 324 P.2d 938 (Calif. 1958); *Rozen v. Blumenfeld,* 255 P.2d 850 (Calif. 1953).

It is important to recognize that at the time all of these California appellate decisions were made, the established rule in that state was that a legal presumption of due care, *if properly given at the outset by the trial court,* was deemed to be evidence and as such could be weighed by the jury as against other evidence introduced at the trial. *Laird v. T. W. Mather, Inc., supra,* 51 Cal.2d 210, 331 P.2d 617, 624 (1958).

However, at the time the jury instructions were given by the trial court in the principal case the law in Cali-

fornia had been changed in this respect, and those legal, or "disputable" presumptions are no longer "deemed as evidence" or continuing in nature throughout the course of the trial. In the 1965 revision to the California Evidence Code, made effective January 1, 1967, the definition of a presumption was promulgated and adopted as follows and is found in Vol. 29-B of the California Code Anno., Sec. 600(a):

> A presumption is an assumption of fact the law requires to be made from another fact or group of facts found or otherwise established in the action. *A presumption is not evidence.* (Emphasis supplied.)

Hence, it is extremely significant that the California courts have held on numerous occasions the giving of the instructions on presumption of due care to be prejudicial error where the party who obtained the benefit thereof had fully testified concerning his conduct immediately prior to and at the time of the accident, notwithstanding its then existing law that such presumptions are properly "weighed" with other evidence introduced at the trial. By contrast, the great weight of authority in other jurisdictions of the United States, consisting of as many as 37 separate states, have rejected the proposition that a legal or "disputable" presumption must be weighed and considered by the jury as evidence. They have adopted the legal principle that once evidence is introduced on the same subject of the presumption, it then vanishes and cannot be weighed or considered in any respect by the jury. *A fortiori,* in all of these jurisdictions, including Nevada and California since 1967, the error in the trial court's instruction herein necessarily was more prejudicial

and compounded by the repetitive use of language requiring such presumption to be "overcome" or "outweighed" especially when considered in the context with the mandatory and peremptory terms used in the instruction.

IV. B. THE TRIAL COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY THAT THE PRESUMPTION OF DUE CARE (THAT THE LAW HAS BEEN OBEYED) WAS A CONTINUING PRESUMPTION TO BE CONSIDERED AS EVIDENCE WHICH MUST BE OUTWEIGHED AND OVERCOME BY OTHER TESTIMONY AND EVIDENCE AT THE TRIAL.

The rule of law established by the great weight of authority existing in at least 37 jurisdictions in the United States is that a legal presumption is not evidence or continuing in nature, but vanishes and cannot be considered by a jury after introduction of testimony or evidence on the subject at the trial. The instruction on presumptions given by the trial court in the principal case placed erroneously heavy emphasis and reiteration upon the phrase "unless and until outweighed or overcome by evidence," thereby making those legal presumptions evidence which must be weighed by the jury against all of the other evidence introduced at the trial. This is not the correct legal principle in Nevada, the federal courts, or at the time of the trial in this case, in the State of California.

In *Ariasi v. Orient Insurance Co.*, 50 F.2d 548 (9th Cir. 1931) the Ninth Circuit considered the effect upon presumptions after evidence on the subject has been introduced at the trial. The Court declared:

> . . . the prima facie effect of the revocation is dissipated by positive evidence to the contrary. It does

> not constitute evidence to be placed in the scale, and weighed as against the positive evidence of the plaintiff to the effect that he did not intend to violate the law and had not done so. . . . A presumption is not evidence, and it has no weight as evidence. It only makes a prima facie case for the party in whose favor it exists. A presumption merely points out the party who has the duty of going forward. The party against whom the presumption operates has the burden of producing satisfactory evidence to rebut the presumption. When this has been done the presumption becomes inoperative, and is laid aside, and the case proceeds as it would if no presumption had been invoked."

The case was reversed upon the sole ground that giving the instruction on the presumption was prejudicial error.

Bates v. Bowles White & Company, 353 P.2d 663 (Wash. 1960) was an action against a broker and an insurer for negligent failure to write hull coverage on plaintiff's boat. The question of ownership was in issue and the court at the pre-trial conference recognized a presumption that all property acquired during coverture was presumed to be community property, even though plaintiff had introduced direct evidence to the contrary which gave rise to a disputed fact. The appellate court reversed a summary judgment and stated:

> "A presumption is not evidence; its efficacy is lost when the opposite party adduces prima facie evidence to the contrary." (Citing Washington decisions.)

This well established principle of law was invoked by the Arizona Supreme Court in *Seiler v. Whiting,* 52 Ariz. 542 (1938):

> "There has been much erroneous thinking and more loose language in regard to presumptions. We read of presumptions of law and presumptions of fact, of conclusive presumptions and disputable presumptions. In truth there is but one type of presumption in the strict legal meaning of the word, and that is merely a general rule of law that under some circumstances, *in the absence of any evidence to the contrary,* a jury is compelled to reach a certain conclusion of fact. But a presumption so declared by the law is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule of law imposed by the law, to be applied in the absence of evidence, and whenever evidence contradicting the presumption is offered the latter disappears entirely, and the triers of fact are bound to follow the usual rules of evidence in reaching their ultimate conclusion of fact. As was once said, 'Presumptions may be looked on as the bats of law, sitting in the twilight, disappearing in the sunshine of actual facts.' . . . (84 P.2d at 454)"

Other cases holding that presumptions are not evidence and demonstrating that the instruction was prejudicially erroneous are: *Hertz v. Record Publishing Co.,* 29 F.2d 397 (5th Cir. Pa. 1955); *McElroy v. Forle,* 232 N.E.2d 708 (Ill. 1967); *State v. Lawry,* 405 S.W.2d 729 (Mo. 1966); *Jensen v. City of Duluth,* 130 N.E.2d 515 (Minn. 1964); *Reed v. Queen Anne's R. Co.,* 57 A. 529 (1903); *Klink v. Harrison,* 332 F.2d 219 (3rd Cir. 1964); *King v. Johnson Bros. Construction Co.,* 155 N.W.2d 183 (S.D. 1967); *Gulle v. Boggs,* 174 So.2d 26 (Fla. 1965); *Dwyer v. Ford Motor Co.,* 178 A.2d 161 (N.J. 1962); *Gaudreau v. Eclipse Pioneer Division of Bendix Air Corp.,* 61 A.2d

227 (N.J. 1948); *Allison v. Snelling & Snelling, Inc.*, 229 A.2d 861 (Pa. 1967).

These authorities make it indubitably evident that the judgment must be reversed by reason of the overemphasized burden placed upon Plaintiff in this case to prove her case in chief.

V. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT A VIOLATION OF THE RENO CITY ORDINANCE CREATED ONLY A PRESUMPTION OF NEGLIGENCE AS A MATTER OF LAW WHICH MIGHT BE OVERCOME BY EVIDENCE OF THE EXERCISE OF ORDINARY CARE.

The Court instructed the jury:

> A violation of that ordinance of the City of Reno or state law which I have just read to you creates a presumption of negligence as a matter of law.
>
> However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, you find by a preponderance of the evidence that the driver with which you are immediately concerned did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law. (T 435-436)

A. Under Nevada Law Violation of a Statute or Ordinance Constitutes Negligence as a Matter of Law.

Ryan v. The Manhattan Big Four Mining Company, 38 Nev. 92, 145 P. 907 (1914), involved the failure of Defendant mining company to provide an iron-bonneted safety cage for raising and lowering employees down a mine shaft as required by a Nevada statute. The Court stated at page 100:

> It has been held, as a general proposition, that whenever an act is enjoined or prohibited by law, and the violation of the statute is made a misdemeanor, any injury to the person of another, caused by such violation, is the subject of an action, and that the violation of the law is the basis of the right to recover, and constitutes negligence *per se*.

In its decision, the Court made it clear that this mining law was a remedial statute, intended primarily to safeguard the life and limb of those persons who were to be raised and lowered in the shaft. Hence the violation of such a safety statute was negligence as a matter of law in Nevada.

Southern Pacific Company v. Watkins, 83 Nev. ....., 435 P.2d 498 (1967), reaffirmed Nevada law to be that violation of a statute or ordinance designed for the safety of members of the public, is negligence as a matter of law, and not merely a "presumption" of negligence which can be rebutted by other evidence of the exercise of ordinary care. The Nevada statute required an engineer in a railroad locomotive to ring the bell and sound the whistle at least 1,320 feet from a railway crossing. The trial court instructed the jury:

> A violation of this statute which is a proximate cause of an accident constitutes negligence as a matter of law.

The Supreme Court of Nevada expressly approved this instruction, and held that the violation of a statute or ordinance constitutes negligence as a matter of law in Nevada. The Court declared (at page 511):

> The instruction is a recital of a criminal statute (NRS 705.430) and if the jury found a violation

thereof by appellant or its agents which would constitute the proximate cause of an accident, it would amount to negligence as a matter of law.

The use of a violation of a criminal statute as the basis for common-law negligence has been upheld in this state, as well as in many others. (citing *Ryan v. Manhattan Big Four Mining Company, supra*).

Prosser on Torts, § 35 (3d Ed. 1964), states: 'The standard of conduct required of a reasonable man may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate. Within the limits of municipal authority, *the same may be true of ordinances.* The fact that such legislation is usually penal in character, and carries with it a criminal penalty, will not prevent its use in imposing civil liability, except in the comparatively rare case where the penalty is made payable to the person injured, and clearly is intended to be in lieu of all other compensation.' (Emphasis added)

It is manifestly clear, under these Nevada cases, that a violation of Reno city ordinance 10-111 by Defendant Mario Delizio constituted negligence *per se,* and not just a "presumption" of negligence rebuttable by other evidence.

An analysis of the decisions considering this principle of law and legal effect of a violation of a statute or an ordinance demonstrates that the trial court in the principal case instructed the jury and applied the law existing in a few minority jurisdictions in the United States creating merely a rebuttable presumption of negligence

by reason of the violation which is only considered by the jury together with all of the other facts and circumstances disclosed by the evidence in the case. This is not the principle of law recognized by the great weight of authority of jurisdictions in the country, who apply the rule of law in Nevada that a violation of a statute or an ordinance is negligence *per se*. Citation of these voluminous authorities would unduly burden the Court. However, some analogous cases in accord with *Southern Pacific Company v. Watkins,* 83 Nev. ....., 435 P.2d 498 (1967) *supra,* are: *Brand v. J. H. Rose Trucking Company,* 427 P.2d 519 (Ariz. 1967); *Smith v. Portland Traction Company,* 359 P.2d 899 (Ore. 1961); *Martin v. Herzog,* 126 N.E. 814 (Court of Appeals N.Y. 1920).

B. A Violation of the Reno City Ordinance Which Constitutes Negligence as a Matter of Law Cannot Be Overcome by Evidence of the Exercise of Ordinary Care.

It is compellingly clear that the trial court also erred in instructing the jury in this case that a violation of a Reno City Ordinance created only a presumption of negligence as a matter of law *which might be overcome by evidence of the exercise of ordinary care.* In *Alders v. Ottenbacher,* 116 N.W.2d 529 (S.D. 1962), a statute required a car to be equipped with brakes adequate to control the movement, to stop and hold the vehicle and that the brakes be maintained in good working order. The defendant operated his car with defective foot brakes in violation of this statute. The Supreme Court of South Dakota in reversing a lower court judgment for defendant declared (at page 532):

> It may thus be said that when the driver or owner of a motor vehicle violates the specific regulations

as to brakes contained in section 44.0346, supra, he is guilty of negligence as a matter of law unless it appears that compliance was *excusable* because of circumstances resulting from causes beyond his control and not produced by his own misconduct. *Evidence of due care does not furnish an excuse or justification.* The court in Bush v. Harvey Transfer Company, supra, (146 Ohio St. 657, 67 N.E.2d 851), points out the difference: 'Since the failure to comply with * * * a safety statute constitutes negligence per se, a party guilty of the violation of such statute cannot excuse himself from compliance by showing that "he did or attempted to do what any reasonable prudent person would have done under the same or similar circumstances." A legal excuse * * * must be something that would make it impossible to comply with the statute.' (citing cases). (Emphasis added)

In *Florke v. Peterson,* 245 Iowa 1031, 65 N.W.2d 372 (1954), the Supreme Court of Iowa stated (at page 376):

> The ban against passing at or near intersections is not of common law origin making its violation mere evidence depending upon the circumstances of the particular case. The legislature has instead imposed on hurried motorists an absolute duty, in addition to the common law requirement to exercise reasonable care under the existing conditions of the specific case.
>
> The fact that courts recognize there may be a 'legal excuse' for statute violation is quite different from permitting the violator to invoke the common law rule of reasonable care or the care which a reasonably prudent man would exercise under like circumstances.

In addition, the Iowa court set forth the four categories of legal excuse: (1) anything that would make compliance

with the statute impossible; (2) anything over which the driver has no control, which places his car in a position violative of the statutes; (3) an emergency not of the driver's own making, by reason of which he fails to obey the statute; (4) an excuse specifically provided by statute. In conclusion, the Iowa Court stated (at page 376):

> The statute demands something more than 'ordinary care;' or perhaps more accurately, it increases the requirements of ordinary care. Before starting to pass a vehicle in front of him the *driver must make sure* that he is not 'approaching within one hundred feet of or traversing an intersection'. (Emphasis added)

The principles of law set forth in the above cited cases, negativing evidence of the exercise of ordinary care to excuse, rebut or cause a "presumption of negligence" to vanish, and affirming that once a violation of a statute or an ordinance is established the only remaining legal predicate for liability is evidence that the violation was a proximate cause of plaintiff's injury, are equally voluminous as those in the great weight of authority of jurisdictions establishing that the violation constitutes negligence as a matter of law. Additional cases refusing to permit evidence of ordinary care to obviate a violation of a statute or an ordinance are: *Chicago, Rock Island & Pacific Railroad Co. v. Breckenridge,* 333 F.2d 990 (8th Cir. 1964); *Nardi v. Reliable Trucking Co.,* 81 N.E.2d 411 (Ohio 1948); *McConnell v. Herron,* 402 P.2d 726 (Ore. 1965); *Wilde v. Ramsey,* 177 N.E.2d 684 (Ohio 1960).

The trial court committed additional error when it gave an instruction on speed taken from Nevada Revised Statutes 484.060, instead of the Reno City Ordinance estab-

lishing a speed limit of 25 miles per hour for traffic on through and uncontrolled streets.

Without question, a Reno City Ordinance regulating speeds within the City boundaries takes precedence over and preempts a Nevada statute regulating speeds over State highways.

Nevada Constitution, Art. 8, § 8, authorizes "home rule" or self-government for its cities and towns. Pursuant to that constitutional provision, Nevada Revised Statutes 266.010 was enacted, creating such "home rule."

The Charter of The City of Reno, Art. XII, Section N.220, provides, in part: "The city council shall have power to regulate the speed at which cars, automobiles, bicycles, and other vehicles may run within the city limits . . ."

Thus, the city ordinance pertaining to speed preempted the "basic speed law" of Nevada Revised Statutes 484.060, which should not have been given. It enabled Defendant's counsel to argue to the jury that "some violation" of N.R.S. 484.060, on the part of Plaintiff's husband, Francis Cochran, even if it were "one per cent of all the proximate causes of the accident" barred any recovery by Plaintiff. By contrast, if the Court had instructed the jury that the Reno City Ordinance established only a 25 mile speed limit, then the jury would necessarily have been required to find a speed in excess of that limit before recovery could have been barred on the basis of excessive speed. Thus, the combination of prejudicial errors with respect to instructions on the legal effects of a violation by Defendant Mario Delizio of Reno City Ordinance 10-111, and Francis Cochran's operation

of the Plymouth automobile relating to the state statute dictates that the judgment be reversed and the action remanded for retrial in the interests of justice.

VI. THERE WAS A TOTAL FAILURE BY DEFENDANT TO PLEAD THE AFFIRMATIVE DEFENSE OF PASSENGER CONTRIBUTORY NEGLIGENCE, AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE GIVING OF SAID INSTRUCTION.

Contributory negligence of a passenger must be pleaded as an affirmative defense. F.R.C.P. 8 (c). It is important to note that Defendant in his Answer did not plead contributory negligence on the part of Plaintiff Lois Cochran as a passenger (Tr. of Rec. 7), nor was the matter raised in Defendant's Memorandum of Contentions of Fact and Law (Tr. of Rec. 61), and he did not at any time seek permission from the Court to amend his Answer, and the Court did not do so of its own motion. The issue never was raised at any time during the trial, and the reason therefor is evident from the record—there was insufficient evidence to raise such an issue.

There is no credible evidence in the record of any conduct on the part of Francis Cochran, the driver of the automobile, which would require any affirmative action on the part of Plaintiff. The testimony and physical evidence, as demonstrated by the photographs and the diagram, positively negatives speed on the part of the Cochran automobile. Mr. Cochran testified that he was traveling at a speed of between 20 and 25 miles an hour. (T 278) At the scene of the accident Mr. Cochran told Officer Walen he was going about 25 miles an hour prior

to the accident. (T 25) The reverse side of the Reno City Police Accident Report, Plaintiff's Exhibit 17, shows the speed of the Cochran vehicle at 25 miles per hour. (T 65).

Defendant offered no evidence whatsoever as to any negligent conduct on the part of Lois Cochran. The testimony of Defendant's witnesses as to the speed of the Cochran vehicle is incredible, unbelievable and contradictory. Defendant Delizio testified that the other vehicle was traveling 60 miles per hour or better (T 90), yet immediately thereafter he testified that he *never saw the other vehicle before the collision.* (T 91) From the entire testimony and the physical evidence it is obvious that Mr. Delizio never saw the other car until the collision, as he testified. There was absolutely no way that he could form an estimate of the speed of the Cochran vehicle. Mr. Furry testified that he had no estimate of the speed of the Plaintiff automobile and had no idea how fast it was traveling. (T 200) Ada Schaefer, another passenger in the Delizio vehicle, testified that the Cochran automobile was traveling between 70 and 80 miles an hour. (T 309) This testimony was also unbelievable and incredible inasmuch as she later testified *she had no idea how fast the other car was going.* (T 322) Helen Furry testified she could not give an estimate as to the speed of the Cochran vehicle. (T 211)

In addition to not pleading contributory negligence on the part of the Plaintiff passenger, it should also be noted that counsel for Defendant did not even mention the subject in his closing argument. In fact in his argument he even admitted that the estimates of speed by Mr. Delizio and Ada Schaefer did not make any sense and were not true:

"Mr. Delizio, he said at least 60 miles an hour. That can't possibly be true.

* * * *

"Ada Schaefer said 70 to 80. She doesn't even drive an automobile. She can't possibly be making a reasonable estimate. It doesn't make any sense." (T 2A 37)

Plaintiff respectfully submits that there simply was no credible evidence to support the giving of the instruction on contributor negligence on the part of the Plaintiff passenger and the giving of such an instruction constitutes reversible error.

Schafer v. Gilmer, 13 Nev. 330 (1878) held:

"It is a well settled principle of law that the instructions given must be considered with reference to the pleadings and the evidence. In this case the question of contributory negligence is not raised in the pleadings, and no testimony was offered that would authorize its consideration by the jury."

Contributory negligence is an affirmative defense which must be specifically pleaded and proved by a preponderance of the evidence. *Wells, Inc. v. Shoemake,* 64 Nev. 57, 177 P.2d 451 (1947).

In *Devine v. Cook,* 3 Utah 2d 134, 279 P.2d 1073 (1955), supra, plaintiffs contended that the trial court committed error in instructing the jury on the issue of contributory negligence of the plaintiffs, both of whom were passengers. The Supreme Court first noted that defendants did not plead contributory negligence on the part of the passengers and it was only after the case had been tried and after the court had indicated the instructions were to be given that the pleadings were permitted to be amended

so as to raise the issue. The Court then stated, at p. 1078: "The law is amply clear that where there is no evidence of contributory negligence the jury should not be instructed on such issue."

The Court then quoted and cited from numerous decisions, in all of which the giving of a similar type instruction constituted prejudicial error. The Court then held, at p. 1079:

> It is therefore apparent in this case the pleadings and evidence did not warrant or support the instructions on contributory negligence of the plaintiffs Mrs. Devine and Mrs. Gusinda, and the giving of said instructions was error.

Ordinarily the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented. *Bartek v. Glasers Provisions Co.,* supra, 160 Neb. 794, 71 N.W.2d 466 (1955), holding that in a factual situation virtually identical to the present case it would have been error for the court to have submitted an instruction on contributory negligence of the passenger. See also *Robinson v. Cable,* 359 P.2d 929 (Cal. 1961).

Contributory negligence must be set up as an affirmative defense, and the burden of proving it by a preponderance of the evidence is on the defendant. *There must be substantial evidence of negligence—a scintilla of evidence will not do. Liesey v. Wheeler,* 60 Wash.2d 209, 373 P.2d 130 (1962).

In *Conroy v. Perez,* 148 P.2d 680 (Cal. 1944), defendant asked for leave of court to amend his answer to set

up the defense of contributory negligence, which application was made just before defendants called their last witness. Leave was granted but defendants never did file an amended pleading. The Court held, at p. 686:

> In the foregoing state of the record the trial court was justified in concluding that plaintiff was entitled to a new trial either upon the ground that no issue of contributory negligence on the part of the child's father had been pleaded, and that therefore the instructions given on that defense were improper; or upon the ground that under all the circumstances it was error for the court to grant leave to amend at the end of the trial so as to bring in a new defense.

The giving of an instruction on the issue of contributory negligence when not pleaded as an affirmative defense is reversible error. *Hancock v. Thigpen,* 256 P.2d 428 (Okla. 1953).

It is well settled that contributory negligence to be an issue must be pleaded, and it is waived unless pleaded. *Provost v. Worrall,* 142 C.A.2d 367, 298 P.2d 726 (1956); *Greene v. M. & S. Lumber Co.,* 108 C.A.2d 6, 238 P.2d 87 (1951).

Plaintiff respectfully submits that in view of Defendant's failure to plead contributory negligence of Plaintiff as a passenger, and the issue never having been raised at any time during the pendency of the action, and mentioned for the first time after trial, during the settling of instructions, together with the total lack of credible evidence of contributory negligence as a passenger, the giving of said instruction was prejudicial and reversible error.

VII. THE COURT ERRED IN ADMITTING EVIDENCE OF A CLAIM MADE BY DEFENDANT'S PASSENGER ADA SCHAEFER AGAINST PLAINTIFF AND HER HUSBAND AND THAT THE CLAIM HAD BEEN CLOSED.

Ada Schaefer, a passenger in the Defendant Delizio's automobile, testified, over objection (T 261), that she received certain personal injuries in the accident out of which Plaintiff's suit arose, and that she had made a claim against Mr. and Mrs. Cochran, which was closed. (T 310-311)

This testimony clearly is irrelevant, immaterial and directly prejudiced Plaintiff, the impact of the testimony being that Plaintiff was at fault. The law is well established that such evidence is inadmissible and constitutes prejudicial and reversible error.

A case directly in point is *Schenker v. Bourne,* 102 N.Y.S.2d 928 (N.Y. 1951), involving an action for personal injuries sustained in an automobile collision. The trial court admitted evidence that two persons, not parties to the present suit, had instituted actions against the plaintiff, which had been settled and discontinued before the present trial. The appellate court reversed the judgment for defendant, holding that the above evidence could serve no legitimate purpose and was prejudicial to plaintiff's case.

Another case directly in point is *Ross v. Fishtine,* 227 Mass. 87, 177 N.E. 881 (1931), also involving an action for personal injuries resulting from an automobile collision resulting in a verdict for plaintiff. During the trial defendant made an offer of proof that plaintiff, or someone in his behalf, had paid certain sums of money to

defendant and the passengers in defendant's car. The trial court rejected the offer of proof and was affirmed by the appellate court, holding at p. 811:

> Nor did the evidence offered tend to prove an admission by the plaintiff that his negligence was a contributing cause of the collision. It shows no more than a compromise of the claims of the defendant and the occupants of his automobile—a purchase of peace by the plaintiff. There is no evidence in the record from which a different meaning of the payments can be inferred. These payments stand no better as admissions than would offers of compromise, which, of course, are inadmissible.

Ada Schaefer is in exactly the same position as the passengers in the defendant Fishtine's automobile above, and the admission in evidence of her claim against Mr. and Mrs. Cochran was clearly inadmissible and prejudicial.

Plaintiff submits that the decision in *Meek v. Miller*, 1 F.R.D. 162 (D.Ct. Penn. 1940), is squarely in point and requires reversal. The *Meek* case was an action for personal injuries resulting from an automobile collision involving the cars of plaintiff and defendant. In his answer, defendant asserted the following affirmative defense:

> Claims were made by the defendant and his wife, who was an occupant in his automobile, against the plaintiff for injuries and damages sustained in said accident by the defendant and his said wife, due to the negligence of the plaintiff herein. The said claims were referred by the plaintiff herein to his indemnifying insurance company, which said company paid the claims of the defendant and his said wife for and on behalf of the plaintiff, the plaintiff thereby ad-

mitting negligence and responsibility for said accident.

Plaintiff's motion to strike the affirmative defense was granted, the Court holding, at p. 163:

> Assuming the assertions of defendant's paragraph 12 can be proved, the matter set forth therein would not be admissible in evidence. The fact that plaintiff's insurance company paid defendant's claims against plaintiff does not show an admission of liability by the plaintiff. It shows only a compromise of defendant's claims against plaintiff. Such payment stands in no better position as evidence than an offer of compromise, which latter is inadmissible as proof of admission of liability. (citing cases) It will not help defendant's case in any particular if he could prove such statement, but on the other hand, *to allow the contested allegation to remain in the pleadings might result in prejudice to the plaintiff.* (Emphasis added.)

The above case was before the Appellate Court again, *Meek v. Miller,* 38 F.Supp. 10 (D.Ct. Penn. 1941), following the trial thereof which resulted in a verdict for defendant. Plaintiff moved for a new trial on the grounds that defendant had elicited, on cross-examination, virtually the same information which had been ruled upon as inadmissible in the earlier *Meek* case. The substance of the information sought to be elicited by counsel for defendant implied that plaintiffs were to blame for the accident. The Court pointed out that the question asked by defense counsel was not completed and no answer was given, yet the statement of defendant's counsel in the hearing of the jury clearly brought to their attention the purpose of the question together with a clear implication

of the anticipated answer that plaintiff's insurance company had determined plaintiff was at fault. After referring to its previous decision, quoted above, the Court held, at p. 12:

> The jury might, therefore, draw the inference that plaintiff's insurance company had placed the blame on plaintiff, and had paid defendant's claims. *This was exactly the irrelevant and prejudicial information which the Court had sought to forestall in its order striking out the 12th paragraph of the affidavit of defense.* (Emphasis added.)

The verdict for defendant was reversed and a new trial ordered.

If, as in the *Meek* case, a mere *inference* that a claim was made against a plaintiff, indicating fault, constitutes prejudicial and reversible error, certainly the actual *testimony* as to such a claim constitutes prejudicial error.

The law is well established that where a settlement is made by way of compromise with a third person not a party to the suit, arising out of the same transaction or incident, evidence of the settlement with that third party is clearly irrelevant and is not admissible in evidence. *Brown v. Pacific Electric Ry. Co.*, 180 P.2d 424 (Cal. 1947); *Baesens v. New York Cent. R. Co.*, 193 N.Y.S. 720 (1922); *Cochrane v. Fahey*, 245 App. Div. 41, 280 N.Y.S. 622 (1935); see also Annot., "Admissibility of Evidence That Defendant in Negligence Action Has Paid Third Persons on Claims Arising From the Same Transaction or Incident as Plaintiff's Claim," 20 A.L.R.2d 304.

CONCLUSION

Appellant respectfully requests that the judgment herein be reversed and the cause remanded for a new trial.

Dated, Reno, Nevada,
May 10, 1968.

Respectfully submitted,
RICHARD P. WAIT,
ROGER L. ERICKSON,
LAW OFFICES OF RICHARD P. WAIT,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD P. WAIT

(Appendix Follows)

Appendix

Appendix

LIABILITY OF MOTOR VEHICLE OWNER FOR NEGLIGENT OPERATION BY IMMEDIATE MEMBER OF FAMILY

41.440 Liability of motor vehicle owner for negligent operation by immediate member of family. Any liability imposed upon a wife, husband, son, daughter, father, mother, brother, sister or other immediate member of a family arising out of his or her driving and operating a motor vehicle upon a highway with the permission, express or implied, of such owner is hereby imposed upon the owner of the motor vehicle, and such owner shall be jointly and severally liable with his or her wife, husband, son, daughter, father, mother, brother, sister or other immediate member of a family for any damages proximately resulting from such negligence or willful misconduct, and such negligent or willful misconduct shall be imputed to the owner of the motor vehicle for all purposes of civil damages.

(Added to NRS by 1957, 60)

41.450 Operator to be made party defendant; recourse on recovery of judgment. In any action against an owner on account of imputed negligence as imposed by NRS 41.440, the operator of the motor vehicle whose negligence is imputed to the owner shall be made a party defendant if service of process can be had upon the operator as provided by law. Upon recovery of judgment, recourse shall first be had against the property of the operator so served.

(Added to NRS by 1957, 61)

41.460(2)(b) "Owner" has only the significance attributed to it by NRS 41.440.

COURT'S INSTRUCTIONS

The following instructions were all inserted by the Court, at the beginning of the instructions, between written and offered instruction four and written and offered stock instruction six:

The defendant claims contributory negligence and to establish the defense of contributory negligence the burden is upon the defendant to prove by a preponderance of the evidence that the plaintiff or the driver of the car in which the plaintiff was riding, that is, her husband, was negligent, and that such negligence contributed as a proximate cause of the injury.

If you find there was any negligence on the part of Francis Cochran, the husband and driver of the car, which proximately contributed to the collision, such negligence is deemed to be the negligence of the plaintiff in this case.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, that some contributory negligence on the part of the plaintiff herself, or the driver of the car in which she was riding, was a proximate cause of any injuries and consequent damage which the plaintiff may have sustained. Contribu-

tory negligence is fault on the part of a person injured, in this case the plaintiff or the driver of the car, which cooperates in some degree with the negligence of another, and so helps to bring about the injury.

By the defense of contributory negligence, the defendant in effect alleges that even though the defendant may have been guilty of some negligent act or omission which was one of the proximate causes, the plaintiff herself or her husband by her failure or his failure to use ordinary care—and that term will be defined to you in a moment—under the circumstances for her own safety at the time and place in question also contributed as one of the proximate causes of any injuries and damages the plaintiff may have suffered.

The burden is on a defendant alleging the defense of contributory negligence to establish by a preponderance of the evidence in the case the claim that the plaintiff herself or the driver of the car, her husband, was also at fault and that such fault contributed one of the proximate causes of any injuries and consequent damages plaintiff may have sustained.

The issues to be determined by the jury in this case are these:

First: Was the defendant negligent?

If your unanimous answer to that question is "No," you will return a verdict for the defendant; but if your unanimous answer is "Yes," you then have a second issue to determine, namely:

Second: Was the negligence of the defendant a proximate cause of any injury or damage to the plaintiff?

If your unanimous answer to that question is "No," you will return a verdict for the defendant: but if your unanimous answer is "Yes," then you must find the answer to a third question, namely:

Third: Was the plaintiff or her husband guilty of any contributory negligence?

If you should unanimously find that he or she was not, then, having found in plaintiff's favor in answer to the first two questions, you will determine the amount of plaintiff's damages and return a verdict in the plaintiff's favor for that amount.

On the other hand, if you should unanimously find, from a preponderance of the evidence in the case, that the plaintiff or her husband was guilty of some contributory negligence, and that plaintiff's or her husband's fault contributed as a proximate cause of any injuries which plaintiff may have sustained, you will not be concerned with the issues as to damages, but will return a verdict for the defendant.

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of that allegation is proved by a preponderance of the evidence, you will find the same to be not true.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant. (T 422-426)

EXHIBITS

		Identified	Received
Plaintiff's Exhibit	1	Tr. of Rec. 96	Tr. of Rec. 96
" "	2	" " "	" " "
" "	3	" " "	" " "
" "	4	" " "	" " "
" "	5	" " "	" " "
" "	6	" " "	" " "
" "	7	" " "	" " "
" "	16	T 9	T 37
" "	16A	T 37	T 37
" "	17		T 62
Defendant's Exhibit	A	T 39	
" "	B	T 39	

Note: Defendant's Ex. A. for Identification, and Plaintiff's Ex. 17 in evidence are the same document.